

1 Allen Ruby, Esq. SB #47109
2 Glen W. Schofield, Esq. SB #47308
3 Steven A. Ellenberg, Esq., SB #151489
4 RUBY & SCHOFIELD
5 125 South Market Street, Suite 1001
San Jose, California 95113
Telephone: (408) 998-8500

5 Attorneys for Plaintiff

ORIGINAL FILED

JAN 12 2005

Richard W. Wiesking
Clerk, U.S. District Court
Northern District of California
San Jose

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION

E-FILING

10
11 SANTANA ROW HOTEL PARTNERS,
L.P.,

CASE NO.

C05 00198

12 Plaintiff,

13 v.
14

ZURICH AMERICA INSURANCE
COMPANY and GALLAGHER-
PIPINO, INC.,

H R L

15 Defendants.

JURY TRIAL DEMANDED

16
17 Comes now plaintiff SANTANA ROW HOTEL PARTNERS, L.P. ("plaintiff" or
18 "Hotel Partners") and alleges as follows:

19
20 PARTIES

21 1. Plaintiff is a Texas limited partnership. Plaintiff built, and now operates, the
22 Valencia Hotel (the "Hotel"), a luxury hotel located at 355 Santana Row, San Jose,
23 California.

24 2. Plaintiff is informed and believes that defendant Zurich America Insurance
Company ("Zurich") was and now is a corporation duly organized and existing under the
25 laws of the State of Illinois, with its principal place of business in the State of Illinois. On
26 information and belief, Zurich is licensed to transact and is transacting the business of
27 insurance in the State of California.

1 3. Plaintiff is informed and believes that defendant Gallagher-Pipino, Inc.
 2 ("Gallagher") was and now is a corporation duly organized in the State of Ohio with its
 3 principal place of business in the State of Ohio. At all relevant times, Gallagher was the
 4 agent of Zurich for the purpose of binding, contracting for and documenting policies of
 5 insurance. In doing the things hereinafter alleged, Gallagher at all times acted as the agent
 6 for Zurich within the course and scope of such agency.

7 4. Plaintiff is informed and believes and thereon alleges that at all times herein
 8 mentioned, each of the defendants was the agent or employee of each of the remaining
 9 defendants, and in doing the things hereinafter alleged, was acting within the course and
 10 scope of such agency.

JURISDICTION AND VENUE

11 5. This Court has subject matter jurisdiction over this action pursuant to 28
 12 U.S.C. §1332 because there is complete diversity between plaintiff and defendants, and the
 13 amount in controversy in this action exceeds \$75,000.00 exclusive of interest and costs.

14 6. Venue is proper in this district under 28 U.S.C. §1391 in that the events giving
 15 rise to these claims occurred in this district and the defendants transact business here.

GENERAL ALLEGATIONS

16 7. The Hotel occupies real estate which plaintiff leases from FRIT San Jose
 17 Town and Country Village, L.L.C. ("FRIT"). The Hotel is part of a large mixed use,
 18 retail/residential community developed by FRIT.

19 8. While the Hotel was under construction, and before the Fire, for valuable
 20 consideration Zurich issued its insurance policy number IM3184453-00 (the "Policy"),
 21 which insured plaintiff and others against losses caused by fire and other risks.

22 9. Attached to this Complaint as Exhibits "A" and "B" respectively, are copies of
 23 Certificates of Insurance dated August 29, 2002 and January 8, 2003 which confirm that
 24 plaintiff was insured under the Policy.

25 10. On August 19, 2002, while the Hotel was under construction, there was a fire
 26 at the Santana Row development (the "Fire"). The Hotel had been scheduled to open on or

1 about January 1, 2003, but because of the massive damage and destruction caused by the
2 Fire, the Hotel was not fully operational until more than a full year after its scheduled
3 opening. The Fire caused losses to the plaintiff, including without limitation rental income
4 loss, extended general conditions, and soft costs in excess of \$10 million.

5 11. All of the losses suffered by plaintiff because of the Fire are covered by the
6 Policy.

7 12. More than two years after the Fire, in September 2004, Zurich made a partial
8 payment to plaintiff under the Policy in the sum of \$713,839.00 for losses suffered by
9 plaintiff because of the Fire.

10 13. Also in September 2004, Zurich extended in writing through January 31,
11 2005, all statutes of limitation applicable to the claims asserted by plaintiff against Zurich in
12 this action.

13 14. On or about December 23, 2004, Zurich denied in writing plaintiff's claim for
14 payments under the Policy, except for the partial payment of \$713,839.00.

FIRST CLAIM FOR RELIEF
(Breach of Contract Against Zurich)

17 15. Plaintiff realleges and incorporates by reference each and every allegation
18 contained in paragraphs 1 through 14 above.

16. Plaintiff is an insured under the Policy.

20 17. Plaintiff has performed all of its obligations under the Policy, or was excused
21 from performance.

22 18. Plaintiff has demanded payment under the Policy in an amount to which
23 plaintiff is entitled, but Zurich has failed and refused and continues to fail and refuse to pay
24 plaintiff's covered losses, except for the partial payment of \$713,839.00 in September,
25 2004.

26 19. As a proximate result of Zurich's failure and refusal to comply with its
27 obligations under the Policy, plaintiff has been damaged in a sum in excess of \$10,000,000,
28 together with interest thereon at the legal rate.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
(Tortious and Bad Faith Breach of Contract Against Zurich)

20. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 19 above.

21. As described above, Zurich has tortiously and in bad faith breached its obligation to plaintiff under the Policy and the law in the following fashion:

- a. Zurich has unreasonably delayed in its payment under the Policy.
- b. Zurich has failed to effectuate a prompt, fair and equitable payment of plaintiff's claims.
- c. Zurich has denied that it has any obligation to plaintiff despite representations made to plaintiff by Zurich and its agent Gallagher that the Policy covers the damages claimed by plaintiff and despite Zurich's concession that plaintiff is a named insured through its unconditional payment to plaintiff.

22. As a direct and proximate result of Zurich's failure to pay benefits under the Policy, plaintiff has been damaged in an amount in excess of \$10,000,000 plus interest.

23. As a further, direct and proximate result of Zurich's wrongful conduct as herein alleged, plaintiff has been required to retain counsel in order to attempt to recover the benefits owed to it under the Policy as an insured.

24. Zurich acted in conscious disregard of the rights of plaintiff, and was and has been guilty of malice, oppression and fraud in committing the acts described in this Complaint. The conduct of Zurich warrants an award of punitive damages in an amount appropriate to punish Zurich and deter others from engaging in similar wrongful conduct.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

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THIRD CLAIM FOR RELIEF
**(Breach of Third Party Beneficiary Contract
Against Gallagher and Zurich)**

3 25. By letter dated December 23, 2004, Zurich denied that it ever issued a policy
4 of insurance to plaintiff, and further denied that it insured plaintiff in any manner
5 whatsoever for losses suffered in the Fire. Although plaintiff disputes these denials,
6 plaintiff pleads the Third and Fourth Claims for Relief as alternative pleadings under Rule
7 8(e)(2), Federal Rules of Civil Procedure.

26 Plaintiff incorporates by reference paragraphs 1-7, 10, 13 and 14 above.

9 27. On or about March, 2001, FRIT on the one hand and Gallagher and Zurich on
10 the other hand entered into a written contract under which Gallagher would procure a policy
11 of insurance from Zurich that would insure plaintiff against a variety of hazards, including
12 fire, associated with construction of the Hotel.

13 28. This contract among FRIT, Gallagher and Zurich was expressly made for
14 plaintiff's benefit to provide plaintiff with insurance against a variety of hazards, including
15 fire, while the Hotel was under construction. Gallagher and Zurich had actual knowledge
16 that the contract was made for plaintiff's benefit.

17 29. On information and belief, FRIT fulfilled all of its obligations under this
18 contract.

19 30. Gallagher and Zurich breached the contract by failing to obtain a policy of
20 insurance which insured plaintiff from a variety of risks, including fire, associated with
21 construction of the Hotel.

31. As a result of the breach by Gallagher and Zurich, plaintiff has suffered
32 damage in excess of \$10 million.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

**FOURTH CLAIM FOR RELIEF
(Fraud Against Gallagher and Zurich)**

27 32. Plaintiff realleges and incorporates by reference each and every allegation
28 contained in paragraphs 1-7, 10, 13, 14 and 25-31 above.

1 33. Gallagher and Zurich intentionally defrauded plaintiff as follows.

2 34. On or about August 29, 2002, Gallagher and Zurich prepared and delivered to
3 plaintiff the "Evidence of Property Insurance" which is attached to this Complaint as
4 Exhibit "A". This document purports to show on its face that plaintiff is insured under
5 Zurich American Insurance Policy No. IM318445300, with insurance coverage limits
6 exceeding \$200 million.

7 35. Exhibit "A" is a fraud, and was known to be fraudulent by Gallagher and
8 Zurich when they prepared, made, and delivered it to plaintiff. Plaintiff was not insured
9 under Policy No. IM318445300, or any other policy of insurance issued by Zurich.
10 Gallagher and Zurich prepared and delivered this false evidence of property insurance with
11 the intent to conceal the breach of contract described in the Third Claim for Relief above,
12 and to deceive plaintiff into believing that it was insured for losses suffered in the Fire.

13 36. Plaintiff reasonably relied upon the false evidence of property insurance to its
14 detriment, and suffered damage as a result.

15 37. On or about January 8, 2003, defendants Gallagher and Zurich prepared and
16 delivered to plaintiff the "Evidence of Property Insurance" attached to the Complaint as
17 Exhibit "B". This document purports to show on its face that plaintiff is insured under
18 Zurich American Insurance Policy No. IM318445300, with insurance coverage limits
19 exceeding \$200 million.

20 38. Exhibit "B" is a fraud, and was known to be fraudulent by Gallagher and
21 Zurich when they prepared, made, and delivered it to plaintiff. Plaintiff was not insured
22 under Policy No. IM318445300, or any other policy of insurance issued by Zurich.
23 Gallagher and Zurich prepared and delivered this false evidence of property insurance with
24 the intent to conceal the breach of contract described in the Third Claim for Relief above,
25 and to deceive plaintiff into believing that it was insured for losses suffered in the Fire.

26 39. Plaintiff reasonably relied upon the false evidence of property insurance to its
27 detriment, and suffered damage as a result.

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1 40. The conduct of Gallagher and Zurich as aforesaid was willful, deliberate,
2 malicious, oppressive and fraudulent, warranting an award of punitive and exemplary
3 damages.

4 WHEREFORE, plaintiff prays judgment as hereinafter set forth.

PRAYER

Plaintiff prays judgment as follows:

1. For compensatory damages against each defendant in excess of \$10,000,000;
2. For exemplary and punitive damages according to proof;
3. For attorneys fees and costs of suit;
4. For such other and further relief as the Court deems proper.

DATED: January 1, 2005

RUBY & SCHOFIELD

PV

ALLEN RUBY
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial in this action.

DATED: January 1, 2005

RUBY & SCHOFIELD

By

ALLEN RUBY
Attorneys for Plaintiff

EXHIBIT A

08/28/2002 10:28 FAX 3307265748

GALLAGHER PIPINO

1004

FRITSAN

DATE (MM/DD/YY)
08/29/02**ACORD - EVIDENCE OF PROPERTY INSURANCE**

THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.

PRODUCER Gallagher Pipino, Inc. 7600 Market Street P.O. Box 3849 Youngstown, OH 44513	PHONE 330 726-8177 FAX No Ext.	COMPANY Zurich-American Insurance Co.
CODE: AGENCY CUSTOMER ID # 3779	SUB CODE:	
INSURED FDI TT SAN JOSE TOWN & COUNTRY LTD. T.T.S. Rockville, MD 20852-4041	LOAN NUMBER 05/15/00	POLICY NUMBER TM218445200 TERMINATED IF CHECKED
THIS REPLACES PRIOR EVIDENCE DATED:		

PROPERTY INFORMATION LOCATION DESCRIPTION Santana Row, San Jose, CA. Hotel Valencia
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COVERAGE PERIOD/FORMS	AMOUNT OF INSURANCE	DEDUCTIBLE
Builders Risk Coverage: Limit of Liability: Hard Costs Soft Costs:	\$200,000,000 \$ 50,000,000	\$25,000 14 days
Sublimits of Insurance: Insit: Offsite Storage: Earthquake: Flood:	\$1,000,000. \$1,000,000. \$25,000,000. \$25,000,000.	\$25,000. \$25,000. S% value \$25,000. \$25,000.

Delay in Completion Endorsement, Extended Period of Indemnity: 355 days <i>365</i>
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CANCELLATION: THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW 90 DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.
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ADDITIONAL INTEREST NAME AND ADDRESS Santana Row Hotel Partners, LP Hotel Valencia Santana Row San Jose, CA. 95128	MORTGAGEE LOSS PAYEE LOAN #	X ADDITIONAL INSURED
AUTHORIZED REPRESENTATIVE		

EXHIBIT B

01/08/03 WED 15:01 FAX 330 726-8177

GARIBOLDI PIPER JAFFRAY

FRA SAN

DATE (M/d/y)

01/08/03

ACORD - EVIDENCE OF PROPERTY INSURANCE

THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.

INSURER	PHONE [INC. NO. E&I]:	330 726-8177	COMPANY	Zurich-American Insurance Co.
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Lagher Pipino, Inc.
760 Market Street
P.O. Box 3849
Youngstown, OH 44513

CODE: SWA CODE:

ACENCY:

CUSTOMER ID #:

INSURED
FRIT San Jose Town & Country Village LLC
C/O 1626 East Jefferson Street
Rockville, MD 20852-4041

LOAN NUMBER

POLICY NUMBER

IM318445300

EFFECTIVE DATE
05/15/00EXPIRATION DATE
11/12/2002CONTINUED UNTIL
TERMINATED IF CHECKED

THIS REPLACES PRIOR EVIDENCE DATED:

PROPERTY INFORMATION

LOCATION/DESCRIPTION
Santana Row, San Jose, CA.
Hotel Valencia

COVERAGE INFORMATION

COVERAGE/PERILS/FORMS

		AMOUNT OF INSURANCE	DEDUCTIBLE
Builders' Risk Coverage:		\$200,000,000	\$25,000
Blanket Limit of Liability:	Hard Costs	\$ 50,000,000	14 days
Soft Costs:			
Sublimits of Insurance:		\$1,000,000	\$25,000
Transit:		\$1,000,000	\$25,000
Site Storage:		\$25,000,000	5% value
E. Quake:		\$25,000,000	\$25,000
Flood:			

REMARKS (Including Special Conditions)

Delay in Completion Endorsement - Period of Indemnity: 365 days

CANCELLATION

THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD. SHOULD THE POLICY BE TERMINATED, THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW 90 DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.

ADDITIONAL INTEREST

NAME AND ADDRESS

Santana Row Hotel Partners, L.P.
(added as Additional Insured 7-15-01)MORTGAGEE ADDITIONAL INSURED

LOSS PAYEE

LOAN #

AUTHORIZED REPRESENTATIVE